In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1136

AERO MAYFLOWER TRANSIT CO., INC., APPELLANT

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment (J.S. App. 17a) of a three-judge district court dismissing an action brought by appellant to set aside an order of the Interstate Commerce Commission. The Commission's order denied appellant's application for a certificate of public convenience and necessity to op-

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erate as a common carrier by motor vehicle between points in Alaska under the Alaska "grandfather" statute. 49 U.S.C. 306(a)(5). Section 306(a)(5) authorizes the Commission to issue such certificate, without proof that the public convenience and necessity will be served thereby, to any person who "was in operation on August 26, 1958, * * * as a common carrier engaged in the transportation in interstate or foreign commerce of passengers or property by motor vehicle between places in the territory of Alaska, and has so operated in Alaska since that time * * *."[1]

Appellant was one of a number of household goods carriers which sought such "grandfather" rights. The Commission consolidated the applications for hearing and decision and assigned two examiners to preside. Appellant claimed that it qualified for grandfather rights on the basis of operations between points in Alaska by Alaska Van & Storage Company ("Alaska Van") which, appellant alleged, had operated as its agent. In an earlier proceeding before the Commission, Alaska Van had previously obtained its own grandfather certificate on the basis of the same operations considered in this case.[2]

Appellant offered the testimony of two witnesses, its general business manager and the Seattle representative of Alaska Van, in support of its application. Neither witness testified as to shipments be-

[1] Appellant has abandoned a claim to "grandfather" rights between points in the contiguous forty-eight states and Alaska under 49 U.S.C. 306(a)(4) (J.S. 6).

[2] *Alaska Van & Storage Co., Inc.—"Grandfather" Applic.*, 94 M.C.C. 381, reversed on other grounds, 240 F. Supp. 501 (D. Alaska).

tween points in Alaska and none of its exhibits reflecting shipments between 1958 and 1962 dealt with such transportation. Indeed, appellant's general manager testified that its vehicles in Alaska were leased from Alaska Van, which hired, paid and directed the drivers, insured the vehicles, apparently registered them and had control of their operations (Tr. 697–698, 730). Alaska Van's Seattle representative could not describe Alaska Van's operations in Alaska and could not state with certainty whether appellant's Alaskan shipments had been handled by Alaska Van or one of its affiliates. Although the Seattle representative testified that appellant had the power to reject employees or facilities of Alaska Van (Tr. 771), appellant's general manager did not know whether that power had ever been exercised (Tr. 754).[3]

The examiners concluded that the appellant had failed to establish that it ever was engaged in operation as a common carrier by motor vehicle between points in Alaska and that its application, accordingly, should be denied (J.S. App. 10a). The Commission adopted the report and order of the examiners. *Mollerup Van Lines—Alaska Grandfather Applic.*, 95 M.C.C. 338.

A three-judge district court sustained the Commission's order (J.S. App. 12a–17a). Upon a careful review of the record, the court found that there was

[3] The Seattle representative also testified that appellant had carried household goods between the contiguous forty-eight states and Alaska—an issue not involved in this proceeding (see n. 1, *supra*)—and that it had received c.o.d. revenues and paid loss and damage claims (Tr. 776, 778).

substantial evidence to support the Commission's determination that the appellant, who had the burden of proof, had failed to show that it so controlled Alaska Van & Storage Company as to make its operations those of the appellant (J.S. 14a).

ARGUMENT

The decision below is correct, and this appeal does not present a substantial question warranting plenary review by this Court.

Appellant failed to show that it performed transportation services between points in Alaska during the relevant period. Its alleged agent there, Alaska Van, was awarded a grandfather certificate on the basis of the very operations now relied on by appellant.[4] The Commission found that Alaska Van had held itself out to perform those services, had maintained the staff, facilities and equipment necessary to do so, and had generally directed and controlled the operations involved. Although appellant had notice of Alaska Van's application (26 Fed. Reg. 2016), it declined to challenge that application. Having failed to do so, it cannot now collaterally attack the Commission's earlier determination by contending that Alaska Van was simply operating as its agent. Under these circumstances, the Commission's denial of appellant's application is plainly correct since "Congress did not intend to confer multiple 'grandfather' rights on the basis of a single transportation service."

[4] *Alaska Van & Storage Co., Inc.—"Grandfather" Applic.*, *supra*, n. 2.

United States v. *Rosenblum Truck Lines,* 315 U.S. 50, 56.

Appellant's contention (J.S. 12–16) that the Commission's order conflicts with *Thomson* v. *United States,* 321 U.S. 19, is without merit. First, *Thomson* reaffirmed the *Rosenblum* principle that a single transportation service cannot give rise to multiple grandfather rights (321 U.S. at 24, 25). Second, while *Thomson* indicated that the critical question is whether the applicant held itself out to the public as offering the services for which it seeks certification, here appellant offered no evidence to establish that it had ever held itself out to perform or that it could or did perform significant transportation services between points in Alaska; rather, all of its evidence was directed to the now abandoned claim under Section 306(a)(4) involving transportation "between places in the United States and places in Alaska." Third, in *Andrews Van Lines, Inc.* v. *United States,* 240 F. Supp. 763 (D. Neb.), affirmed *per curiam,* 382 U.S. 67, the present order was sustained against attack by other carriers; the district court there concluded that the purported agency arrangement did not suffice under *Thomson* to make the Alaskan operations those of the applicants (240 F. Supp. at 769).[5]

Furthermore, appellant's evidence failed to show that it had exercised direction and control of the motor vehicle operations in Alaska for which it sought "grandfather" authority or that it had assumed full

[5] The Commission's conclusions in these consolidated proceedings were also sustained in *United Van Lines, Inc.* v. *United States,* 249 F. Supp. 984 (E.D. Mo.).

responsibility for such operations to shippers and to the general public. *Thomson* v. *United States*, 321 U.S. at 26; see also, *Moore* v. *United States*, 41 F. Supp. 786, 792 (D. Minn.), affirmed *per curiam* 316 U.S. 642. While domination, control, and direction may not be the sole test for determining whether the lessor or the lessee of the equipment is in fact the carrier who assumes ultimate responsibility for the transportation,[6] in the absence of a persuasive showing that appellant held itself out as an Alaskan carrier or assumed the risks of Alaskan operations, neither the Commission nor the lower court erred in rejecting appellant's claims.[7]

Finally, appellant's contention (J.S. 17–20) that the Commission's findings are not supported by substantial evidence was, upon review of the whole record, rejected by the court below (J.S. App. 14a). Appellant bore the burden of proving that it had been in operation in Alaska, and it failed to sustain that burden. In any event, this contention plainly does not present a substantial question for this Court's consideration. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491; *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502–503.

[6] *United States* v. *Drum*, 368 U.S. 370.

[7] *Motor Truck Supply Co.* v. *United States*, 238 F. Supp. 645, 647 (D. Minn.); *Schultz Transit, Inc.* v. *United States*, 208 F. Supp. 537, 541 (D. Minn.); *Allen* v. *United States*, 187 F. Supp. 625, 629 (S.D. Fla.); *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13, 20 (D. Minn.),

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

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